

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 2, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2009AP62-FT**

**Cir. Ct. No. 2007CV2832**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ASH PARK, LLC, A WISCONSIN LIMITED LIABILITY COMPANY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALEXANDER & BISHOP, LTD., A WISCONSIN CORPORATION,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County:  
WILLIAM M. ATKINSON, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.<sup>1</sup> Alexander & Bishop, Ltd., appeals an order requiring it to pay prejudgment interest immediately and make quarterly payments

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<sup>1</sup> This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of postjudgment interest. Alexander & Bishop contends the circuit court was without jurisdiction to enter the order. We agree and reverse the order.

### **BACKGROUND**

¶2 In December 2007, Ash Park brought this action against Alexander & Bishop for breach of a real estate purchase contract. Ash Park was the seller and sought specific performance of the contract. In April 2008, the circuit court granted summary judgment to Ash Park, ordering specific performance of the purchase contract. On August 18, 2008, the court entered an order requiring Alexander & Bishop to pay prejudgment interest on the purchase price of the property at the statutory rate of five percent for the time between the scheduled closing date and the date of the judgment. The court also ordered Alexander & Bishop to pay postjudgment interest at the rate of twelve percent from the date of the judgment until Alexander & Bishop purchased the property.

¶3 Alexander & Bishop appealed the summary judgment granting specific performance and the order awarding pre- and postjudgment interest. We affirmed both. *See Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2009 WI App 71. However, while that appeal was pending, on November 7, 2008, the circuit court entered a new order regarding pre- and postjudgment interest. The November 2008 order required immediate payment of prejudgment interest and quarterly payments of postjudgment interest.

### **DISCUSSION**

¶4 Alexander & Bishop claims the circuit court did not have jurisdiction to enter the November 2008 order regarding pre- and postjudgment

interest because of the pending appeal from the August 2008 order.<sup>2</sup> Ash Park counters that the August 2008 order was ambiguous and the circuit court had the power to clarify it. Ash Park also claims Alexander & Bishop's appeal is frivolous.

¶5 The parties do not dispute that the November order was entered during the pendency of the appeal from the August order. Generally, a circuit court does not have jurisdiction to act during a pending appeal. *See* WIS. STAT. §§ 808.07 and 808.075. However, §§ 808.07 and 808.075 provide exceptions to that rule. Whether the circuit court had authority to enter the November order is a question of law that we review de novo. *See Harvest Savings Bank v. ROI Invests.*, 228 Wis. 2d 733, 737-38, 598 N.W.2d 571 (Ct. App. 1999).

¶6 We conclude the circuit court did not have jurisdiction to enter the November order while an appeal was pending from the August order. The only statutory exception that Ash Park cites is found in WIS. STAT. § 808.07(2)(a)3. Section 808.07(2)(a)3 allows a court to “make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.” While Ash Park cites § 808.07(2)(a)3 as an example of when a circuit court may act during an appeal, Ash Park does not argue that exception applied here.

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<sup>2</sup> In its briefs, Alexander & Bishop also argued the circuit court erred by awarding interest on a judgment requiring specific performance. We addressed whether interest could be awarded on a judgment for specific performance in our decision on the appeal from the August order. *See Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2009 WI App 71, ¶¶26-31. By letter to this court, Alexander & Bishop has since withdrawn that argument in this appeal.

¶7 Eschewing an argument based on a statutory exception, Ash Park relies on *Cashin v. Cashin*, 2004 WI App 92, ¶¶10-18, 273 Wis. 2d 754, 681 N.W.2d 255, where we applied the rule that “while a written judgment that is clear on its face is not open to construction, the trial court does have the authority to construe an ambiguous judgment to effectuate the trial court’s objective.” Relying on *Cashin*, Ash Park argues the court did not modify the August order, but merely clarified it. Ash Park contends the August order was ambiguous because it did not state when pre- and postjudgment interest were to be paid.

¶8 We first note that *Cashin* does not address the issue presented here, which is whether the court had jurisdiction to act during a pending appeal. That question turns on whether there is a statutory exception allowing the circuit court to act. No exception is argued here.

¶9 Regardless, we do not agree that the lack of a payment schedule and deadlines in the August order rendered it ambiguous. The August order specified pre- and postjudgment interest rates for specific time periods. It was not ambiguous.<sup>3</sup> The November order added a payment schedule and deadlines. Because the August order was not ambiguous, the additions in the November order amounted to a modification of the August order. Therefore, the November order’s imposition of a payment schedule and deadlines went beyond a mere clarification under *Cashin*. See *Cashin*, 273 Wis. 2d 754, ¶¶10-18.

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<sup>3</sup> Under Ash Park’s reasoning, any order for pre- and postjudgment interest would be ambiguous if it did not specify dates for payment.

¶10 Finally, we deny Ash Park's motion claiming Alexander & Bishop's appeal is frivolous. Under WIS. STAT. RULE 809.25(3), for an appeal to be found frivolous, one or more of the following must occur:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Because we are reversing the November order based on Alexander & Bishop's claim that the court lacked jurisdiction, we conclude neither of these circumstances is present here.

*By the Court.*—Order reversed. Motion for frivolous costs denied.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

